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Balakrishnan a/l Veerapan & Ors v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-09–264–12 OF 2011
ABU SAMAH, ALIZATUL KHAIR AND TENGKU MAIMUN JJCA
14 JUNE 2013

B

Criminal Procedure — Bail bond — Forfeiture — Appeal against — Eight accused charged for offence under s 395 of the Penal Code — Trial delayed and adjourned several times due to inability to trace accused persons — Sum RM30,000 forfeited — Whether bailors performed obligations under bail bond — Whether attempts to secure attendance of accused persons sufficient

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D

In the present appeal, eight accused persons, with another at large, were charged in the sessions court for an offence under s 395 read together with s 34 of the Penal Code. On 4 October 2010, learned defence counsel informed the court that the fourth accused was in Ibu Pejabat Daerah Subang Jaya while the sixth accused 'dibuang daerah di bawah perintah darurat di Machang, Kelantan'. The other six accused persons were absent but all the three bailors were present. The court issued a warrant of arrest against the first, second, third, fifth, seventh and eighth accused and a notice to show cause to the bailors. A further date was fixed but when the date arrived, the defence counsel informed the court that the fifth and sixth accused 'dibuang daerah sama ada di Bachok atau Machang'. Meanwhile the sixth accused was said to have vanished. When the case came up on a later date, the warrant of arrest was not executed. At an adjourned date, the warrant of arrest was still not executed. The sessions court judge ('SCJ') proceeded to hear the notice to show cause and found that the bailors had failed to perform their obligations under the bail bond and ordered that the whole sum of RM30,000 be forfeited as it was found that the reasons given by the appellants to trace the accused persons were not sufficient. Dissatisfied with the order of the SCJ in forfeiting the bail bond, the bailors appealed to the High Court which affirmed the decision of the sessions court. Hence, the present appeal.

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Held, allowing the appeal:

(1) Sufficient attempts were made by the appellants to secure the attendance of the accused persons in court. The SCJ did not exercise the discretion properly in deciding on the forfeiture. The SCJ failed to consider that if any of the accused persons were under restricted residence, it might then not be within the powers of the bailors to bring them to court. Further, the appellants had explained the efforts that they made to ensure the attendance of the accused persons in court. They had gone to the house

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of the accused persons and had checked the whereabouts of the accused persons with the family members and with their friends (see para 16).

(2) Despite the resources that the police have at their disposal, for four months the police could not trace the accused persons to execute the warrant of arrest. The appellants as lay persons could not be expected to be more successful than the police in tracing the accused persons and bringing them to court. Further the trial could have proceeded on two occasions when all the accused persons were present (see para 16).

[Bahasa Malaysia summary

Dalam rayuan ini, lapan tertuduh, dengan seorang lagi yang masih bebas, dituduh di mahkamah sesyen untuk kesalahan di bawah s 395 dibaca bersama s 34 Kanun Keseksaan. Pada 4 Oktober 2010, peguambela yang bijaksana memberitahu mahkamah bahawa tertuduh keempat berada di Ibu Pejabat Daerah Subang Jaya sementara tertuduh keenam 'dibuang daerah di bawah perintah darurat di Machang, Kelantan'. Keenam-enam tertuduh yang lain tidak hadir tetapi kesemua ketiga-tiga bailor hadir. Mahkamah mengeluarkan waran tangkap terhadap tertuduh pertama, kedua, ketiga, kelima, ketujuh dan kelapan dan notis untuk menunjuk sebab kepada bailor. Tarikh selanjutnya ditetapkan tetapi apabila tiba pada tarikh tersebut, peguambela memberitahu mahkamah bahawa tertuduh kelima dan keenam 'dibuang daerah sama ada di Bachok atau Machang'. Sementara itu tertuduh keenam dikatakan telah menghilangkan diri. Apabila kes tersebut disebut pada tarikh kemudiannya, waran tangkap tidak dilaksanakan. Pada tarikh penangguhan, waran tangkap masih tidak dilaksanakan. Hakim mahkamah sesyen ('HMS') meneruskan untuk mendengar notis untuk menunjuk sebab dan mendapati bahawa bailor telah gagal untuk melakukan tanggungjawab mereka di bawah bon jaminan dan diperintahkan jumlah keseluruhan RM30,000 dirampas kerana ia didapati bahawa alasan-alasan yang diberikan oleh perayu untuk mengesan tertuduh-tertuduh tidak mencukupi. Tidak berpuashati dengan perintah HMS dalam merampas bon jaminan, bailor merayu kepada Mahkamah Tinggi yang mana mengesahkan keputusan mahkamah sesyen. Maka rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Percubaan yang mencukupi telah dibuat oleh perayu-perayu untuk menjaminkan kehadiran tertuduh-tertuduh di mahkamah. HMS tidak menjalankan budi bicara secara betul dalam memutuskan atas perampasan. HMS gagal untuk mempertimbangkan bahawa jika mana-mana tertuduh di bawah kediaman terhad, ia mungkin bukan di bawah kuasa bailor untuk membawa mereka ke mahkamah. Selanjutnya, perayu-perayu telah menjelaskan usaha yang dibuat mereka untuk memastikan kehadiran tertuduh-tertuduh di mahkamah. Mereka telah

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pergi ke rumah tertuduh-tertuduh dan telah memeriksa di mana tertuduh-tertuduh berada dengan ahli-ahli keluarga dan kawan-kawan mereka (lihat perengga 16).

(2) Meskipun pihak polis mempunyai peluang, untuk selama empat bulan polis tidak dapat mengesan tertuduh-tertuduh untuk menyempurnakan waran tangkap. Perayu-perayu sebagai orang biasa tidak boleh dijangka untuk lebih berjaya daripada pihak polis dalam mengesan tertuduh-tertuduh dan membawa mereka ke mahkamah. Selanjutnya perbicaraan mungkin boleh diteruskan pada dua keadaan apabila kesemua tertuduh hadir (lihat perenggan 16).]

Notes

For cases on forfeiture, see 5(1) *Mallal's Digest* (4th Ed, Reissue) paras 1069–1088.

Cases referred to

Valliamai v PP [1962] 1 MLJ 280 (refd)

Legislation referred to

Criminal Procedure Code s 404
Penal Code ss 34, 395

Appeal from: Criminal No 42S-26 of 2011 (High Court, Shah Alam)

K Periasamy (P Selvaraj with him) (Raj &Co) for the appellants.
Mangaiarkarasi a/p Krishnan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] Eight accused persons, with another at large, were charged in the sessions court at Petaling Jaya on 13 January 2009 for an offence under s 395 of the Penal Code read together with s 34 of the Penal Code. Except for the first and the second accused who are Malaysians, the rest of the accused persons are Filipinos.

[2] The case came up several times in the sessions court where initially all the accused persons were under remand. After a few mention dates, the case was fixed for hearing on 5 August 2009 and at this point of time, the first to sixth accused were on bail while the seventh and eighth accused were under remand.

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[3] On 5 August 2009 all the accused persons were present and were represented by counsel. Learned DPP requested for an adjournment on the ground that subpoena was not issued and witnesses were not present. The court allowed the adjournment and hearing was fixed on 6 January 2010 and January 2010. On 9 October 2009 the seventh and eighth accused were offered bail.

[4] On 6 January 2010 all the accused persons were present. Learned DPP requested for an adjournment (a Chinese interpreter was needed). The court fixed hearing date on 1 June 2010 and 2 June 2010.

[5] On 1 June 2010 except for the second accused, all the accused persons and the bailors were present. Learned defence counsel informed the court that he was made to understand that the second accused 'telah dibuang daerah pada Mei 2010 ke Machang'. The court then fixed 4–5 October 2010 and for hearing. Bail was extended for all the accused persons.

[6] On 4 October 2010, learned defence counsel informed the court that the fourth accused 'berada di Ibu Pejabat Daerah Subang Jaya' while the sixth accused was 'dibuang daerah di bawah perintah darurat di Machang, Kelantan'. The other six accused persons were absent but all the three bailors were present. The court issued a warrant of arrest against the first, second, third, seventh and eighth accused and a notice to show cause to the bailors. A further date was fixed on 1 November 2010.

[7] On 1 November 2010, learned defence counsel informed the court that the fifth and sixth accused 'dibuang daerah sama ada di Bachok atau Machang'. The court was further informed by learned counsel that 'Ke enam OKT yang lain telah menghilangkan diri. Penjamin-penjamin hadir. Mereka ingin tarik diri terhadap tertuduh yang tidak hadir'. The learned DPP informed the court that the warrant of arrest in respect of the first, second, third, seventh and eighth accused had not been executed. The application for discharge by the bailors was not allowed by the court. A date was fixed on 29 November 2010 for mention of the warrant of arrest and for the bailors to show cause.

[8] When the case came up on 29 November 2010 the warrant of arrest was not executed. The notes of proceeding show that the hearing on the notice to show cause did not proceed. It was adjourned to 18 January 2011.

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[9] On 18 January 2011 the warrant of arrest was still not executed. The learned sessions judge proceeded to hear the notice to show cause. After hearing the evidence of the bailors, the learned sessions judge found that the bailors had failed to perform their obligations under the bail bond and ordered that the whole of the sum totalling RM30,000 be forfeited. The reasons for the forfeiture are:

(a) Usaha tidak mencukupi untuk kesan OKT-OKT yang dijamin.

(b) Penjamin Bala dan Mohd Ali tak 'sure' atau ingat siapa yang dijamin.

(c) Syarat dan tanggungjawab jadi penjamin telah diterangkan kepada penjamin.

(The fact adverted to by learned sessions judge in para 2 above is not reflected in the examination-in-chief or cross-examination of the bailors).

[10] Being dissatisfied with the order of the sessions court in forfeiting the bail bond, the bailors filed an appeal to the High Court. The learned High Court judge affirmed the decision of the sessions court. Essentially, the High Court found that the sessions judge had complied with the procedure under s 404 of the Criminal Procedure Code and had exercised the discretion correctly.

[11] Before us is the appeal by the bailors against the decision of the High Court. The first appellant was the bailor for the first and the second accused. The first appellant was also the bailor for the third, fourth, fifth and the sixth accused together with the second appellant. The third appellant was the bailor for the seventh and eighth accused. The bail bond for the first and the second accused was in the sum of RM3,000 each. For the third to the sixth accused, the bail bond was RM4,000 each while for the seventh and the eighth accused, it was in the sum of RM4,000 each.

[12] In *Valliamai v Public Prosecutor* [1962] 1 MLJ 280 Ong J said:

> The relevant provisions relating to forfeiture of a bond are in s 404 of the Criminal Procedure Code, which provides for 'every person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid'. This makes it clear that upon sufficient cause shown, forfeiture may be waived altogether, while sub-s (v) further states in specific terms that the court has the discretion to 'remit any portion of the penalty mentioned and enforce payment in part only'. Careful consideration, therefore, ought to be given by magistrates to the question in two stages, first, has sufficient cause been shown against forfeiture; secondly if not, are the circumstances such that the whole sum of the penalty ought to be enforced. This postulates the active exercise of the court's discretion.

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[13] In the instant case, the learned sessions judge found that the reasons given by the appellants to trace the accused persons were not sufficient. There was no mention in the grounds of judgment of the learned sessions judge that due to the insufficient reasons, sufficient cause was not shown against forfeiture. Further, the learned session judge did not state the circumstances which warrant the forfeiture of the whole sum. The basis of forfeiture as appears from the grounds of judgment is simply 'Diharapkan dengan keputusan ini ia memberi 'message' kepada penjamin-penjamin dan bakal penjamin supaya mengambil serius tanggungjawab mereka sebagai penjamin'.

[14] From the record of appeal, there appears to be some inconsistencies as to which accused person 'di buang daerah'. On 1 June 2010 it was stated to be the second accused. On 4 October 2010 it was the sixth accused. Yet on 1 November 2010, the record shows that it was the fifth and the sixth accused who were said to be either in Bachok or Machang, Kelantan.

[15] At the hearing of the notice to show cause, the appellants had explained the efforts that they made to ensure the attendance of the accused persons in court. They had gone to the house of the accused persons and had checked the whereabouts of the accused persons with the family members and with their friends. In cross-examination, it was not suggested to the appellants of other steps or efforts sufficient to locate the accused persons which ought to have been undertaken by the appellants.

[16] It is our view that sufficient attempts were made by the appellants to secure the attendance of the accused persons in court. It is further our view that the learned sessions judge did not exercise the discretion properly in deciding on the forfeiture. The learned sessions judge failed to consider that if any of the accused persons were under restricted residence, then it may not be within the powers of the bailors to bring them to court. Despite the resources that the police have at their disposal, for four months the police could not trace the accused persons to execute the warrant of arrest. The appellants as lay persons cannot be expected to be more successful than the police in tracing the accused persons and bringing them to court, especially if it is true that the second or the fifth or the sixth accused persons were under an order to reside in Bachok or Machang, Kelantan then would they not be prohibited from entering into Petaling Jaya where the trial is to take place? How then could the appellants as lay persons be able to secure the attendance of those accused persons in court? Further, prior to 1 June 2010 (when the second accused was absent for the first time), the trial could have proceeded on two occasions (on 5 August 2009 and on 6 January 2010) when all the accused persons were present, had the learned DPP ensured that subpoena was issued and served on the witnesses and arrangement made for the Chinese interpreter on time, prior to the trial.

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[17] Based on the facts, we allowed the appeal. We set aside the order of the High Court affirming the decision of the sessions court. The amount of RM30,000 to be refunded to the appellants.

Appeal allowed.

Reported by Afiq Mohamad Noor